

No. 78-67

Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

TRUSTEES OF BOSTON UNIVERSITY,
v. *Petitioner,*

NATIONAL LABOR RELATIONS BOARD,
and

BOSTON UNIVERSITY CHAPTER,
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

**SUPPLEMENTAL MEMORANDUM
OF BOSTON UNIVERSITY CHAPTER,
AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS
IN OPPOSITION**

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We wish herewith to apprise the Court of two points made particularly relevant by last week's decision in *NLRB v. Yeshiva University*, No. 78-857 (Feb. 20, 1980). One of them has to do with facts arising since the last briefs were filed in this case—more than one year ago. Both points, we believe, support the denial of review in this case.

1. This Court's decision in *Yeshiva* held that University's faculty to be "managerial employees" by virtue

of their decisive participation in matters of academic governance, *e.g.*, the determination of course offerings; the establishment of teaching methods; and the formulation of grading, admission and graduation policies. *NLRB v. Yeshiva University*, No. 78-857, slip op. at 13 (Feb. 20, 1980). In this case no such contentions were made by the Trustees at any time during the lengthy proceedings leading up to Board certification of the AAUP.¹ To the contrary, the Trustees conceded their faculty's status as employees, contending instead that their departmental chairmen should be excluded by virtue of their claimed supervisory status over full-time faculty. It is principally on this ground that they here seek *certiorari*.

Under familiar principles, parties ought not be allowed to advance on appeal arguments they have failed to make below. Section 10(e) of the NLRA expressly so provides: "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. 160(e). There are here no such "extraordinary circumstances." The argument that their faculty are managerial employees was plainly available to the Trustees had they thought it appropriate. It is true that the Board had consistently rejected similar arguments. But the First Circuit, in what was at the time the only judicial review of the Board's position, had distinctly left open the possibility of this Court's *Yeshiva* decision. *NLRB v. Wentworth Institute*, 515 F.2d 550 (1st Cir. 1975). And at least one contemporary effort to set the stage for judicial review of the issue on a well-

¹ The Trustees did perfunctorily assert the managerial status of their faculty in their Response to the Board's Notice to Show Cause. See Petitioner's Supplemental Brief, p. 3 n.2. This argument was made on November 29, 1976, more than one year after the election and the AAUP's certification.

developed record failed when the union lost the election. *Northeastern University*, 218 N.L.R.B. 247 (1975).

2. Since the First Circuit ordered the Board's bargaining order enforced in April of 1978, bargaining has in fact occurred between the Trustees of Boston University, Petitioner herein, and the Boston University Chapter, American Association of University Professors (AAUP). After nearly a year of negotiation an agreement was reached in April 1979. The Agreement, which was preceded by a faculty strike, came nearly five years after the faculty had first sought recognition from the Trustees.² The Agreement, which is in certain respects retroactive to September 1, 1978, provided fairly substantial economic gains for the faculty and established a grievance procedure under which grievances are currently being processed. It expires on August 31, 1981.³

The parties' behavior since April 1978 thus makes the Board's bargaining order substantially moot. That order required the Trustees to bargain with the AAUP. They have bargained with the AAUP, and they have reached a settlement. Under these circumstances, further review of the Board's order is at best unnecessary. At worst it holds out the potential for needless disruption.

We recognize, of course, that the Board's bargaining order imposes a continuing obligation on the Trustees and that, for that reason, it may not technically be moot. But as a practical matter, should the Trustees wish to test *Yeshiva's* applicability to their faculty, they may do so by refusing to bargain with the AAUP at the expiration of the current agreement. If they prevail, that will end the matter. If they do not prevail, the bargaining

² The AAUP filed its election petition on October 18, 1974. (Pet. p. 3.)

³ The Memorandum of Settlement, the Table of Contents, and the duration clause are included as an Appendix to this Memorandum.

order will simply be revived. It cannot seriously be supposed that additional penalties could be imposed on them by virtue of their technical contempt—even assuming they would be found in contempt.⁴

In short, for practical reasons, we suggest that there is every reason not to reopen the question of the Trustees' bargaining obligation at this late date. Allowing the First Circuit's order to stand will not, in any real sense, deprive the Trustees of any rights they might have as a result of the *Yeshiva* decision. They will be free, as we have suggested, to assert any position they choose in the light of that decision, thereby triggering the lengthy fact-finding process necessary to determine the decision's applicability. There is no reason, we submit, to encourage the commencement of that process before anyone desires or requests it.

Respectfully submitted,

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⁴ We do not believe the force of these considerations to be diminished by the fact that the Memorandum of Settlement provides that the Agreement is "subject to the final disposition of" the First Circuit's order. The fact remains that bargaining occurred and a settlement was reached which is now in effect.

APPENDIX

AGREEMENT BETWEEN THE B.U.C.-A.A.U.P. AND THE TRUSTEES OF BOSTON UNIVERSITY

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MEMORANDUM OF SETTLEMENT

The Boston University Chapter of the American Association of University Professors (Chapter) and the Trustees of Boston University (Trustees) hereby agree as follows:

1. The Trustees and the Chapter accept the terms of the Text of the Agreement attached hereto as an Addendum as modified only in the following respects: [All modifications are incorporated in the Text]
2. No further ratification is required by the Trustees.
3. The current strike of the Chapter shall end upon ratification of this Memorandum of Settlement.
4. Recognizing that the future of Boston University depends in large part upon the mutual good will and trust of all components of the University community, the Trustees and the Chapter agree that there shall be no reprisals or abuse, either institutional or personal, against any member of the University community for his/her actions during the strike.
5. It is understood that the collective bargaining Agreement is subject to the final disposition of First Circuit Cases Numbers 77-1143, 77-1365, and 77-1226, now pending in the Supreme Court of the United States upon a petition of certiorari (No. 87-67). However, it is agreed that, by the execution of this settlement Agreement, neither party waives any of its rights with respect thereto; and it is further agreed that the foregoing does not prejudice the Chapter's right to claim that this agreement remains in effect for its duration.

Signed by the parties on April 13, 1979.

ARTICLE XXV
DURATION OF AGREEMENT

This Agreement shall be in full force and effect for the period from April 13, 1979, to and including August 31, 1981. The Chapter or Trustees may give notice to the other party on or before February 1 prior to the expiration of the Agreement of any intention to terminate or modify the terms of this Agreement upon its expiration. If no agreement is reached by August 31, 1981, this Agreement shall remain in full force and effect for an additional 40 days or until such earlier date as a new agreement is concluded.